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In The
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

JOHN C. DANFORTH
Attorney General
State of Missouri

GLEN A. GLASS
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

*Attorneys for Appellee, State
of Missouri*

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Appellee, State of Missouri, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the United States District Court for the Eastern District of Missouri in this matter be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

Appellee, State of Missouri, was notified on January 29, 1975, by the Clerk, United States District Court, for the Eastern District of Missouri, that the complaint in this case and a similar suit¹ had been

1. The case presently on appeal before this Court was filed simultaneously with a case entitled *Sahm, et al. v. Nations, et al.*, No. 75-78(C)(3), and by order of the lower court dated March 6, 1975, the cases were consolidated. Appellants in Case No. 75-78(C)(3) did not file a notice of appeal to this Court.

duly filed, challenging the constitutionality of §§ 105.510-105.520, Revised Statutes of Missouri, 1969. Thereafter, on April 16, 1975, this appellee filed its motion to intervene. The motion to intervene as a party-defendant was granted by the lower court on July 24, 1975.

Appellants, in their *Jurisdictional Statement* to this Court, have set forth the requisite jurisdictional matters and history of this case, together with an appendix reciting all state statutory matters directly in issue on this appeal and the opinion of the lower court. Therefore, this appellee does not feel it necessary to recite the jurisdictional basis for this appeal and hereby adopts those portions of appellants' *Jurisdictional Statement* entitled "Preliminary Statement", "Jurisdiction", "Statutes Involved" (*Jurisdictional Statement*, pp. 1-3), and the "Appendix".

ARGUMENT

Appellants have claimed that their appeal presents to this Court a significant concern of public employees relating to their alleged constitutional right to bargain with representatives of an appropriate public body. Appellee, State of Missouri, respectfully suggests that federal and state courts have consistently held that no such constitutional right exists. Therefore, the judgment entered by the United States District Court, Eastern District of Missouri, is proper and leaves no substantial question unresolved which requires further decision by this Court.

Appellants contend that the judgment of the lower court failed to recognize "an arbitrary, capricious, and irrational classification" resulting in the exclusion of police officers from the provisions of § 105.520, Revised Statutes of Missouri 1969. The fundamental question upon which appellants' entire argument is predicated is the presence or absence of a constitutional right by public employees in Missouri to bargain² over wages, hours, and working conditions with appropriate government representatives. Contrary to appellants' assertions, the right to collective bargaining, in both the public and private sector, is a statutory right without a constitutional requirement for its existence.

2. Section 105.520, RSMo 1969, is not true collective bargaining as that term is accepted in the private sector and defined in the Labor-Management Relations Act, 29 U.S.C. § 158(d) (see Footnote 3). Section 105.520 is merely a "meet and confer" statute which implies negotiations amounting to a discussion and unilateral action by a public body. True collective bargaining generally implies good faith bargaining by equal parties. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L.Rev. 885, 895 (1973).

Clearly, the right to bargain collectively with employers in the private sector did not exist prior to the enactment of the National Labor Relations Act. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937); *National Labor Relations Board v. Edward G. Budd Manufacturing Co.*, 169 F.2d 571, 577 (6th Cir. 1948), cert. denied, *Foremans Association of America v. Edward G. Budd Manufacturing Co.*, 335 U.S. 908 (1949).

The right of private sector employees to bargain collectively, established by Congress, is found, in part, in Subchapter II of the Labor-Management Relations Act, 29 U.S.C. §§ 151-168 (1970). 29 U.S.C. § 157 (1970) provides the statutory guarantee that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" The scope of the term "collective bargaining" for purposes of the Labor-Management Relations Act is set forth in 29 U.S.C. § 158(d) (1970).³ However, the act further provides that the term "employer" shall "not include the U.S. or . . . any state or political subdivision thereof". 29 U.S.C. § 152(2) (1970). In addition, an "employee" for purposes of the Labor-Management Relations Act does not include "any individual employed . . . by any other

3. 29 U.S.C. § 158(d) (1970) defines collective bargaining as:

" . . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . "

person, who is not an employer as herein defined". 29 U.S.C. § 152(3) (1970). Therefore, public employees are clearly excepted from the bargaining rights set forth in the Labor-Management Relations Act.

Appellee, State of Missouri, submits that federal courts have consistently upheld this principle, that collective bargaining is of statutory, and not constitutional, origin. *Hanover Township Federation of Teachers Local 1954 v. Hanover Community School Corporation*, 457 F.2d 456, 461 (7th Cir. 1972); *Atkins v. The City of Charlotte*, 296 F.Supp. 1068, 1077 (W.D. N.C. 1969); *Newport News F.F.A. Local 794 v. City of Newport News*, 339 F.Supp. 13, 16 (E.D. Va. 1972); *Confederation of Police v. City of Chicago*, 382 F.Supp. 624, 628 (N.D. Ill. 1974).

It should furthermore be noted that the Supreme Court of Missouri has construed the Missouri constitutional provision guaranteeing employees the right to collective bargaining as not being applicable to local governments under the same general principle. In *City of Springfield v. Clouse*, 206 S.W.2d 539, 543 (Mo. Banc 1947), the court held that the right to bargain collectively is not an inherent constitutional right and Article I, Section 29, Constitution of Missouri, 1945, was designed to provide for collective bargaining as that term is understood in employer-employee relations in the private sector. Accordingly, the Supreme Court of Missouri has properly recognized public employee exclusion from collective bargaining in the same manner as federal courts. Certainly this construction makes § 105.520 compatible with the Missouri constitutional provision in question and leaves no substantial question, in this area, for resolution by this Court.

Appellants have further asserted that the exclusion of police officers from the provisions of § 105.520, RSMo 1969, is contrary to their right to equal protection of the law. It is respectfully submitted that the lower court properly held that there exists a rational relation between the exclusion of police from the provisions of § 105.520 and the legitimate interests of the State of Missouri. It is submitted that, since as noted above, there exists no constitutional right for appellants to engage in collective bargaining, any rational basis justifies appellants' exclusion from the provisions of § 105.520, RSMo 1969. *Johnson v. Robison*, 415 U.S. 361 (1974); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

This appellee suggests that a rational basis plainly exists for excluding police from the statutory bargaining process set forth in § 105.520. The State of Missouri and its political subdivisions may exclude police from the limited bargaining process because of the very nature of the police force. Police are certainly *sui generis*, performing a public function with a required degree of discipline and regimentation. In order to be effective, they must be considered by themselves and their public employers as a quasi-military, disciplined force ready to respond to public call. Accordingly, they are quite different from other public employees who, generally, are not shouldered with the burden of constant, indispensable, and often dangerous public service. The Supreme Court of Missouri has recognized this unique place occupied by the police in the state. *King v. Priest*, 206 S.W.2d 547, 554-555 (Mo. Banc 1947); *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 43 (Mo. 1969).

Appellee, State of Missouri, feels it significant to recognize that this Court has recently noted the special type of public function performed by police, necessitat-

ing the dominance of legitimate state interests over asserted liberties under the Fourteenth Amendment to the United States Constitution. In *Kelley v. Johnson*, 44 U.S.L.W. 4469 (U.S., April 6, 1976), this Court upheld a Suffolk County, New York, regulation which restricted the length of policemen's hair. This Court reasoned that the very nature of police work results in a limited infringement on the individual policeman's freedoms in matters personal to him. It is submitted that, likewise, the exclusion of policemen from the provisions of § 105.520, RSMo 1969, has a clear, rational basis founded upon the regulated nature of the police profession.

This Court's attention is invited to *Quinn v. Muscare*, 44 U.S.L.W. 4627 (U.S., May 3, 1976) where the constitutionality of a Chicago Fire Department regulation prohibiting beards was challenged as violative of several constitutional amendments, including the Fourteenth. This Court dismissed the writ of certiorari previously granted relying, in part, on *Kelley v. Johnson*, *supra*.

The most concise expression of the law, encompassing all areas presented to this Court by appellants, can be found in the opinion of the Court in *Indianapolis Education Association v. Lewallen*, 72 L.R.R.M. 2071 (7th Cir. 1969). In that case the Court, in determining whether a public body (school board) has a constitutional obligation to bargain collectively, held:

"... there is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of the defendants-appellants to bargain in good faith does not equal a constitutional violation of plaintiffs-appellees' positive rights of asso-

ciation, free speech, petition, equal protection, or due process. Nor does the fact that the agreement to collectively bargain may be enforceable against a state elevate a contractual right to a constitutional right." (*Id.* at 2072)

This appellee feels compelled to suggest that appellants' assertion, in his jurisdictional statement to this Court, that "there has been no showing or suggestion of how the grant of the rights in question which are enjoyed by all public employees in Missouri would impair the asserted state interest"⁴ suggests an erroneous test to be applied in this case. Clearly, appellant is burdened with the obligation to demonstrate that there is no rational relation between the exclusion of policemen from § 105.520 and the State of Missouri's interest in the maintenance of a disciplined police force and the results obtained thereby. *Kelley v. Johnson, supra*. Therefore, plaintiff had the obligation in the lower court to show the absence of a rational relation between the exclusion and the state interest.

The State of Missouri respectfully submits, therefore, that appellants have presented no substantial question for the decision of this Court, and that the

4. Page 9, Appellants' *Jurisdictional Statement*.

judgment of the United States District Court for the Eastern District of Missouri should be affirmed.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General
State of Missouri

GLEN A. GLASS
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

*Attorneys for Appellee, State
of Missouri*